

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOSEPH HARDESTY, et al.	:	Case No. 1:16-CV-00298
Individually and on behalf of All	:	
Others Similarly Situated	:	Judge Matthew W. McFarland
	:	
Plaintiffs,	:	
	:	AFFIDAVIT OF JOSHUA M. SMITH,
v.	:	ESQ. IN SUPPORT OF PLAINTIFFS'
	:	MOTION IN LIMINE AS TO
THE KROGER CO., et al.	:	DOCUMENTS PRODUCED THREE
	:	YEARS AFTER DISCOVERY
Defendants.	:	CUTOFF

Now comes Joshua M. Smith, Esq., Counsel for Plaintiffs, and for his Affidavit states the following:

1. I am co-counsel of record for the Plaintiffs in this matter.
2. A true and accurate copy of Plaintiffs' discovery request for production number 68 is attached hereto **Attachment 1** – Discovery Request for production number 68 to Defendant (Dated July 8, 2016).
3. A true and accurate copy of Defendant's discovery response for request for production number 68 is attached hereto **Attachment 2** – Defendant's Discovery Response (Dated September 9, 2016).
4. A true and accurate copy of correspondence from Counsel for Defendants to Counsel for Plaintiffs is attached hereto as **Attachment 3** – Defendant's Supplemental Discovery Response Letters (Dated September 16, 2016; September 27, 2016; October 7, 2016; November 23, 2016; December 20, 2016; January 13, 2017; and January 20, 2017)
5. A true and accurate copy of correspondence from Counsel for Defendants to Counsel for Plaintiffs is attached hereto as **Attachment 4** – Defendant's Email (Dated February 21, 2022).


Further Affiant sayeth naught.


Joshua M. Smith

Sworn to and subscribed in my presence this 28th day of February 2022.



Jessica Peterson
Notary Public, State of Ohio
My Commission Expires:
June 29, 2026



Notary Public
State of Ohio

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

JOSEPH HARDESTY, et al.	:	Case No. 1:16-cv-00298
	:	
Plaintiff,	:	Judge Timothy S. Black
	:	
v.	:	
	:	
THE KROGER CO., et al.	:	PLAINTIFFS' FIRST SET OF
	:	REQUESTS FOR ADMISSION,
	:	INTERROGATORIES, AND
Defendants.	:	REQUESTS FOR PRODUCTION OF
	:	DOCUMENTS DIRECTED TO
	:	DEFENDANT KROGER

Pursuant to Rules 26, 33, 34 and 36 of the Federal Rules of Civil Procedure, Plaintiffs Joseph Hardesty, Derek Chipman, and Madeline Hickey ("Plaintiffs") hereby submit their First Set of Requests for Admission, Interrogatories, and Requests for Production of Documents Directed to Defendant The Kroger Co. and Kroger G.O., LLC ("Defendant" or "Kroger"). Plaintiffs respectfully request that Defendant provide responses to the offices of Stagnaro, Saba & Patterson Co., L.P.A., 2623 Erie Avenue, Cincinnati, Ohio 45208, within thirty (30) days of the service of these Requests.

Each of the following Requests for Admission, Interrogatories, and Requests for Production of Documents shall be deemed continuing and Defendant is requested, pursuant to Rules 26(a) and 26(e) of the Federal Rules of Civil Procedure, to provide, by way of supplementary answers thereto, such additional information as may hereafter be obtained by the Defendant or persons acting on its behalf.

INSTRUCTIONS AND DEFINITIONS

1. In answering these Requests for Admission, Interrogatories, and Requests for Production of Documents, Defendant is to divulge all information in its possession, custody, or control, or

63. All documents which support or in any way relate to your “fourteenth affirmative defense” that the Plaintiff and potential class members they seek to represent “lack standing to bring certain asserted claims or to seek certain forms of relief sought therein.”

RESPONSE:

64. Any other documents relating to any affirmative defense set forth in the Answer to the Complaint.

RESPONSE:

Miscellaneous

65. Personnel files of Joseph Hardesty, Derek Chipman, and Madeline Hickey.

RESPONSE:

66. Personnel files for any other individual whom Kroger intends to depose in this matter.

RESPONSE:

67. Copies of all resumes on file for the Named Plaintiffs and all other individuals who have submitted opt-in/consent forms for this lawsuit.

RESPONSE:

68. Performance appraisals for the Named Plaintiffs and all other individuals who have submitted opt-in/consent forms for this lawsuit.

RESPONSE:

74. A copy of any report prepared by a designated expert and Defendant's entire file on the expert, including correspondence with Defendant's attorneys to the extent that information is discoverable under Fed. R.Civ. P. 26(b)(4)(C) and (D).

RESPONSE:

75. True and accurate copies of all documents Defendant intends to introduce at trial or during any hearing or deposition in this matter.

RESPONSE:

76. All documents identified, relied upon, or referred to in answering Plaintiff's Interrogatories, or any Document Request.

RESPONSE:

77. Copies of any documents not produced with respect to any other request that Defendant believes is relevant to this litigation.

RESPONSE:

Respectfully submitted,

/s/ Joshua M. Smith

Peter A. Saba (0055535)

Joshua M. Smith (0092360)

Sharon J. Sobers (0030428)

STAGNARO, SABA

& PATTERSON CO., LPA

2623 Erie Avenue

Cincinnati, Ohio 45208

(513) 533-2701

(513) 533-2733 (fax)

pas@sspfirm.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and accurate copy of the foregoing was served electronically through the District Court's electronic case filing system upon David K. Montgomery, Esq., Jackson Lewis P.C., PNC Center, 26th Floor, 201 East Fifth Street, Cincinnati, Ohio 45202, this 8th day of July, 2016.

Joshua M. Smith (0092360)

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

JOSEPH HARDESTY, et al.	:	Case No. 1:16-cv-00298
	:	
Plaintiff,	:	Judge Timothy S. Black
	:	
v.	:	
	:	
THE KROGER CO., et al.	:	DEFENDANTS' RESPONSES TO
	:	PLAINTIFFS' FIRST SET OF
	:	INTERROGATORIES AND
Defendants.	:	REQUESTS FOR PRODUCTION OF
	:	DOCUMENTS
	:	
	:	

Pursuant to Rules 33 and 34 of the Federal Rules of Civil Procedure, Defendants The Kroger Co. and Kroger G.O., LLC (collectively, “Defendants” or “Kroger”) hereby respond to the First Set of Interrogatories and Requests for Production of Documents Directed to Defendant The Kroger Co. and Kroger G.O., LLC (collectively, the “Discovery Requests”) propounded by Plaintiffs Joseph Hardesty, Derek Chipman, and Madeline Hickey (collectively, “Plaintiffs”) as follows.

GENERAL OBJECTIONS

Defendants make the following general objections to the Discovery Requests, and each such general objection is hereby incorporated by reference, as if fully stated therein, with respect to each of Defendants’ specific responses as appropriate:

1. Defendants object to the Discovery Requests to the extent they seek information or documents that are neither relevant to any party’s claim or defense nor proportional to the needs of the case.

67. Copies of all resumes on file for the Named Plaintiffs and all other individuals who have submitted opt-in/consent forms for this lawsuit.

RESPONSE:

Subject to and without waiving the foregoing objections, Defendants respond as follows: Defendants have produced and/or will produce non-privileged, non-work-product responsive documents.

68. Performance appraisals for the Named Plaintiffs and all other individuals who have submitted opt-in/consent forms for this lawsuit.

RESPONSE:

Defendants object to this Request to the extent it is vague and ambiguous. Subject to and without waiving the foregoing objections, Defendants respond as follows: Defendants have produced and/or will produce non-privileged, non-work-product responsive documents, to the extent such documents exist.

69. Pay stubs or other related documentation indicating the amount of pay received by all Class members.

RESPONSE:

Defendants object to this Request on the grounds that it is vague, ambiguous, overbroad and unduly burdensome, and seeks documents that are not relevant to any party's claim or defense nor proportional to the needs of the case. Defendants further object to this Request on the ground that it seeks confidential and/or private personnel information of individuals who are not parties to this case. Defendants further object to this Request to the extent it seeks documents protected from discovery by the attorney-client privilege and/or work product doctrine.

70. Pay stubs or other related documentation indicating the amount of pay received by the Named Plaintiffs, and any individuals who have submitted opt-in forms to date.

RESPONSE:

Defendants object to this Request on the grounds that it is vague, ambiguous, overbroad and unduly burdensome, and seeks documents that are not relevant to any party's claim or defense nor proportional to the needs of the case. Defendants further object to this Request to the extent it seeks documents protected from discovery by the attorney-client privilege and/or work product doctrine. Subject to

Production of Documents Nos. 1-77 propounded by Plaintiffs, which objections are incorporated by reference as if fully stated herein. Defendants further object to this Request on the grounds that it is overbroad, unduly burdensome, vague and ambiguous, and seeks documents that are not relevant to any party's claim or defense nor proportional to the needs of the case. Defendants further object to this Request to the extent it seeks documents protected from discovery by the attorney-client privilege and/or work product doctrine. Defendants further object to this Request to the extent it seeks confidential and/or private personnel information of individuals who are not parties to this case. Subject to and without waiving the foregoing objections, Defendants respond as follows: Defendants have produced and/or will produce non-privileged, non-work-product responsive documents.

77. Copies of any documents not produced with respect to any other request that Defendant believes is relevant to this litigation.

RESPONSE:

Defendants object to this Request on the grounds that it is overbroad and unduly burdensome, and seeks documents that are not proportional to the needs of the case. Defendants further object to this Request to the extent it seeks documents protected from discovery by the attorney-client privilege and/or work product doctrine. Defendants further object to this Request to the extent it seeks confidential and/or private personnel information of individuals who are not parties to this case.

/s/ David K. Montgomery

David K. Montgomery (0040276)

Jackson Lewis PC

PNC Center, 26th Floor

201 East 5th Street

Cincinnati, OH 45202

Telephone: (513) 898-0050

Facsimile: (513) 898-0051

David.Montgomery@jacksonlewis.com

Attorney for Defendants

CERTIFICATE OF SERVICE

I certify that on September 9, 2016 the foregoing Responses to Plaintiffs' First Set of Interrogatories and Requests for Production of Documents were served via e-mail and U.S. Mail on the following counsel of record:

Peter A. Saba
Joshua M. Smith
Sharon J. Sobers
Stagnaro, Saba & Patterson Co., L.P.A.
2623 Erie Avenue
Cincinnati, OH 45208

/s/ David K. Montgomery

David K. Montgomery

Representing Management Exclusively in Workplace Law and Related Litigation



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GRAND RAPIDS MI	MINNEAPOLIS MN		

*through an affiliation with Jackson Lewis P.C., a Law Corporation

MY DIRECT DIAL IS: (513) 322-5041

MY EMAIL ADDRESS IS: CHARLOTTE.CREECH@JACKSONLEWIS.COM

December 20, 2016

VIA COURIER

Joshua M. Smith
Sharon J. Sobers
Peter A. Saba
Stagnaro, Saba & Patterson Co., L.P.A.
2623 Erie Avenue
Cincinnati, Ohio 45208

Re: *Hardesty, et al. v. The Kroger Co., et al.*
Case No. 1:16-cv-298 and
Joseph Hardesty v. The Kroger Co., et al.
Case No. 1:16-cv-367

Dear Counsel:

Enclosed is a disk containing supplemental responsive documents in connection with the above-referenced matters. The documents bear the Bates numbers KROGER005167-KROGER005705. Several of them have been designated as "Confidential" and are being produced subject to the protective orders in place in these matters.

Should you have any questions, please do not hesitate to contact me.

Sincerely,
JACKSON LEWIS P.C.

A handwritten signature in blue ink, appearing to read "Charlotte Creech".

Charlotte Creech
Paralegal

Enclosure
4842-5420-8830, v. 1

Attachment 3

Representing Management Exclusively in Workplace Law and Related Litigation



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*through an affiliation with Jackson Lewis P.C., a Law Corporation

My DIRECT DIAL IS: (513) 322-5041
My EMAIL ADDRESS IS: CHARLOTTE.CREECH@JACKSONLEWIS.COM

January 13, 2017

VIA FEDERAL EXPRESS

Joshua M. Smith
Sharon J. Sobers
Peter A. Saba
Stagnaro, Saba & Patterson Co., L.P.A.
2623 Erie Avenue
Cincinnati, Ohio 45208

Re: *Hardesty, et al. v. The Kroger Co., et al.*
Case No. 1:16-cv-298 and
Joseph Hardesty v. The Kroger Co., et al.
Case No. 1:16-cv-367

Dear Counsel:

Enclosed are two DVD's containing supplemental responsive documents in connection with the above-referenced matters. The documents bear the Bates numbers KROGER0005706 - KROGER030509. Several of them have been designated as "Confidential" and are being produced subject to the protective orders in place in these matters.

Should you have any questions, please do not hesitate to contact me.

Sincerely,
JACKSON LEWIS P.C.

Charlotte Creech
Paralegal

Representing Management Exclusively in Workplace Law and Related Litigation



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MY DIRECT DIAL IS: (513) 322-5041

MY EMAIL ADDRESS IS: CHARLOTTE.CREECH@JACKSONLEWIS.COM

January 20, 2017

VIA FEDERAL EXPRESS

Joshua M. Smith
Sharon J. Sobers
Peter A. Saba
Stagnaro, Saba & Patterson Co., L.P.A.
2623 Erie Avenue
Cincinnati, Ohio 45208

Re: *Hardesty, et al. v. The Kroger Co., et al.*
Case No. 1:16-cv-298 and
Joseph Hardesty v. The Kroger Co., et al.
Case No. 1:16-cv-367

Dear Counsel:

Enclosed are two DVD's containing supplemental responsive documents in connection with the above-referenced matters. The documents bear the Bates numbers KROGER030510 - KROGER032437. Several of them have been designated as "Confidential" and are being produced subject to the protective orders in place in these matters.

Should you have any questions, please do not hesitate to contact me.

Sincerely,
JACKSON LEWIS P.C.

Charlotte Creech
Paralegal

Representing Management Exclusively in Workplace Law and Related Litigation



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MY DIRECT DIAL IS: (513) 322-5041

MY EMAIL ADDRESS IS: CHARLOTTE.CREECH@JACKSONLEWIS.COM

November 23, 2016

VIA U.S. MAIL

Joshua M. Smith
Sharon J. Sobers
Peter A. Saba
Stagnaro, Saba & Patterson Co., L.P.A.
2623 Erie Avenue
Cincinnati, Ohio 45208

Re: *Hardesty, et al. v. The Kroger Co., et al.*
Case No. 1:16-cv-298

Dear Counsel:

Enclosed is a disk containing supplemental documents responsive to Plaintiffs' First Set of Requests for Production of Documents in the above-referenced matter. The documents bear the Bates numbers KROGER0004494-KROGER005135.

Should you have any questions, please do not hesitate to contact me.

Sincerely,
JACKSON LEWIS P.C.

A handwritten signature in blue ink, appearing to read "Charlotte Creech". The signature is fluid and cursive, with a large loop at the end.

Charlotte Creech
Paralegal

Enclosure
4822-6885-8168, v. 1

Representing Management Exclusively in Workplace Law and Related Litigation



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MY DIRECT DIAL IS: (513) 322-5041

MY EMAIL ADDRESS IS: CHARLOTTE.CREECH@JACKSONLEWIS.COM

October 7, 2016

VIA COURIER

Joshua M. Smith
Sharon J. Sobers
STAGNARO, SABA & PATTERSON CO., LPA
2623 Erie Avenue
Cincinnati, Ohio 45208

Re: Joseph Hardesty v. The Kroger Co., et al.

Dear Counsel:

Enclosed please find Defendants' Supplemental Responses to Plaintiff's First Set of Interrogatories and Requests for Production of Documents and a disk containing responsive documents bearing Bates numbers KROGER003302 – KROGER004493. Both the Responses and many of the responsive documents have been marked as "Confidential" pursuant to the existing protective order in this matter.

Should you have any questions, please do not hesitate to contact us.

Sincerely,
JACKSON LEWIS P.C.

A handwritten signature in black ink, appearing to read "Charlotte Creech". The signature is fluid and cursive, with a large, sweeping "C" at the beginning.

Charlotte Creech
Paralegal

Enclosure



Representing Management Exclusively in Workplace Law and Related Litigation

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MY DIRECT DIAL IS: (513) 322-5041
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September 16, 2016

VIA U.S. MAIL

Joshua M. Smith
Sharon J. Sobers
Peter A. Saba
Stagnaro, Saba & Patterson Co., L.P.A.
2623 Erie Avenue
Cincinnati, Ohio 45208

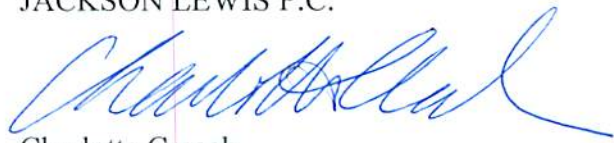
Re: *Hardesty, et al. v. The Kroger Co., et al.*
Case No. 1:16-cv-298

Dear Counsel:

Enclosed is a disk containing supplemental documents responsive to Plaintiffs' First Set of Requests for Production of Documents in the above-referenced matter. The documents bear the Bates numbers KROGER0001919-KROGER003240.

Should you have any questions, please do not hesitate to contact me.

Sincerely,
JACKSON LEWIS P.C.



Charlotte Creech
Paralegal

Enclosure
4822-6885-8168, v. 1

10/10/2016

10/10/2016
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Representing Management Exclusively in Workplace Law and Related Litigation



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GRAND RAPIDS MI	MINNEAPOLIS MN		

*through an affiliation with Jackson Lewis P.C., a Law Corporation

MY DIRECT DIAL IS: (513) 719-5701
MY EMAIL ADDRESS IS: DAVID.ZINS@JACKSONLEWIS.COM

September 27, 2016

VIA E-MAIL & U.S. MAIL

Joshua M. Smith
Sharon J. Sobers
Peter A. Saba
Stagnaro, Saba & Patterson Co., L.P.A.
2623 Erie Avenue
Cincinnati, Ohio 45208

Re: *Hardesty, et al. v. The Kroger Co., et al.*
Case No. 1:16-CV-298

Dear Counsel:

Enclosed you will find Defendants' Responses to Plaintiffs' Second Set of Interrogatories and Requests for the Production of Documents accompanied by the Verification page of Rana Schiff.

Should you have any questions, please do not hesitate to contact us.

Sincerely,

JACKSON LEWIS P.C.

David P. Zins

*Admitted only in California

DPZ/skm
Enclosure

Matthew D. Soaper

From: Martin, Ryan M. (Cincinnati) <Ryan.Martin@jacksonlewis.com>
Sent: Monday, February 21, 2022 2:14 PM
To: Peter A. Saba, Esq.; Joshua M. Smith, Esq.; Sharon J. Sobers; Matthew D. Soaper
Cc: Montgomery, David K. (Cincinnati)
Subject: Hardesty, et al. v. Kroger - Additional Evaluations
Attachments: 20220218203412233.pdf

Categories: Waiting on Reply

Good Afternoon – David and I wanted to message you about an issue that has just come to our attention. Upon reviewing several exhibits listed in Plaintiffs’ exhibit list and documents concerning potential witnesses, it struck us as odd that only two performance evaluations have been produced in this matter even though both sides requested them in discovery. We began reviewing this issue and realized that none of the Named Plaintiffs or initial opt-ins had performance evaluation documents because they did not work for Kroger long enough. As opt-ins came into the case later, we requested, obtained and produced the personnel files of those individuals. After realizing that only two files were produced that contained evaluations, we immediately checked with Kroger to see if additional opt-ins had evaluations for 2015 or 2016. Those additional evaluations, which we just received late Friday night, are attached.

As best we can tell, it appears that performance evaluations for several opt-ins were not yet contained in their files (except for the files of Rhonda Furr and Lawanna Haskins) at the time they were gathered and produced. We believe this issue escaped both sides’ attention during discovery, although the opt-ins certainly would have been aware they had evaluations, because the initial group of Plaintiffs and opt-ins never had any.

The attached documents have not yet been Bates numbered because we wanted to get them to you as soon as possible. We will, however, be re-sending them with Bates numbers included (likely by tomorrow). I also just noticed that some of these were tilted in the scanner (although they all appear readable still). I’ll make sure that issue is correct upon re-sending as well.

In the meantime, please let us know if you want to discuss these documents further.

Thanks,

Ryan



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